IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1897

HOWARD L. ROGERS,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF McKENDREE COLLEGE,
Lebanon, Illinois, et al.,
Appellees.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**for the Seventh Circuit**

CHARLES J. KOLKER
Attorney at Law
Suite 316—Murphy Building
234 Collinsville Avenue
East St. Louis, Illinois 62201
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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**To the United States Court of Appeals**
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The Petitioner, HOWARD L. ROGERS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of The United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 1, 1976.

### OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix herein. The opinion of the District Court is unreported and appears in the Appendix herein.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 1, 1976 affirming dismissal of Petitioner's Amended Complaint by the District Court for the Eastern District of Illinois. This Petition was filed within ninety (90) days of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C.S. § 1254(1).

## QUESTIONS PRESENTED

1. Whether private employers may conspire to deprive a teacher of his rights to free speech and assembly, when the deprivation is motivated by the content of the teacher's speech or by the teacher's conduct in support of others whose speech is unpopular, without violating the teacher's statutory rights under 42 U.S.C. § 1985(3)?

2. Whether an individual teacher who is conspired against for his speech as a member of a professional teaching organization and for his speech and conduct in support of students who editorialize certain views in a newspaper is injured in his civil rights, either directly or indirectly, as a result of a class-based invidious discriminatory bias?

3. Whether Petitioner stated a cause of action under 42 U.S.C. § 1985(3) in his Amended Complaint (Appendix 1)?

4. Whether Petitioner stated a cause of action under 42 U.S.C. § 1986 in his Amended Complaint (Appendix 1)?



## STATUTORY PROVISIONS

United States Code, Title 42 § 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code, Title 42 § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of

the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in any action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

## CONSTITUTIONAL PROVISIONS INVOLVED

### Amendment [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

### Amendment [5]

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of



War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## STATEMENT OF THE CASE

Jurisdiction of this matter is under 28 U.S.C. §1343(1), for an award of damages in conspiratorial actions arising under 42 U.S.C. §§1985 and 1986 and under 28 U.S.C. §1343(4), which authorizes general relief under any Act of Congress providing for the protection of civil rights. Petitioner originally complained of violations of certain civil rights protected by 42 U.S.C. §§1983, 1985(3) and 1986.

Petitioner was a professor under contract for the 1970-1971 academic year to teach at McKendree College, a private institution of higher learning in Lebanon, Illinois. During that year,

he was President of the local chapter of American Association of University Professors and was assigned as faculty adviser to the student newspaper.

As a result of statements allegedly made at AAUP meetings over which Petitioner presided, statements allegedly made by Petitioner in private, and statements and conduct of Petitioner following suspension of the newspaper for which he was faculty advisor, Petitioner's employment contract was terminated by The Board of Trustees of McKendree College.

The Petitioner subsequently filed an Amended Complaint against The Board of Trustees of McKendree College, its President, Dean and Chairman of the Academic Affairs Committee of the Board.



## ARGUMENT

### A. The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict With Prior Decisions of the Supreme Court of the United States.

The language of *Griffin v. Breckinridge*, 403 U.S. 88 (1971) has been misconstrued by the Seventh Circuit so as to cause substantial injustice to the Petitioner herein and to thwart the meaning of 42 U.S.C. § 1985(3).

The *Griffin* opinion states, at 403 U.S. 102, that:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.

The court then continues and clarifies:

> The conspiracy, in other words, must aim at a deprivation of rights secured by the law to all.

At several other points in the *Griffin* opinion the court makes it clear that it is the *animus* or *motivation* that is requisite. When speaking of the history of § 1985, the court said, at 403 U.S. 100:

> The explanations of the added language centered entirely on the animus or motivation that would be required.

Again, quoting from the original debate on the section and specifically from Representative Willard:

> . . . that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws . . . At 403 U.S. 100.

Although Petitioner recognizes that § 1985(3) was not intended to create a new federal tort act, nevertheless, it seems that the plain meaning of the section is being buried in legal obfuscation. The different, contradictory opinions of the various Circuit Courts of Appeals certainly assist the confusion as is more fully discussed in a different part of this argument.

§ 1985(3) plainly reads, in pertinent part:

> . . . two or more persons . . . who conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . (or) if one or more persons do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived shall have an action for the recovery of damages . . .

Petitioner's Amended Complaint clearly alleges such deprivation in Paragraph 18 of Counts I, II, III, IV, more fully set out in the Appendix hereto, but reading in pertinent part:

> Defendants . . . did wrongfully and purposely conspire to deprive . . . him of exercising his rights as a professor and President of his local chapter of the American Association of University Professors in making comments, etc. . . . all in violation of his rights to peaceably assemble, associate and to freely speak, as guaranteed by the provisions of the First Amendment to the Constitution of the United States and of the equal protection of the laws or of equal privileges and immunities under the laws . . .

Thus, Petitioner met the *Griffin* requirements and did allege conspiracy which has as its purpose a class-based invidiously discriminatory deprivation of equal protection of the laws or of



equal privileges and immunities under the law. The lower court's decision in the instant case is in conflict with *Griffin*.

Petitioner did allege membership in a class; in fact, two classes: As a professor and as President and thus necessarily a member of his local AAUP chapter. He alleged conspiracy against him. He alleged conspiracy to deprive him of rights of peaceable assembly, association, speech and of equal protection of the laws or of equal privileges and immunities under the laws. He alleged the entire scheme was wrongful and purposeful.

Petitioner alleged in Count I of his Amended Complaint, in Paragraphs 10, 16, 17, 18 and 19 (See Appendix), that he was dismissed from employment while yet in the course of his employment and under contract, with future contract rights, for his assertions of certain political and social views, and for peaceably assembling and associating with his fellow professors and with students and to assert those rights heretofore set forth under the United States Constitution. The professors and students in the group of which Petitioner was a part, were protesting, *inter alia*, the shutdown of the student newspaper, *The McKendree Review*.

*Griffin*, supra, is to be taken seriously when it repeats the stand that:

> The approach of this Court to other reconstruction civil rights statutes in the years since *Collins* has been to 'accord [them] a sweep as broad as [their] language.' At 403 U.S. 97 citing *United States v. Price*, 383 U.S. 787, 801; *Jones v. Mayer*, 392 U.S. 409, 437.

When *Griffin* is read with Rule 8(f) F.R.C.P., which states that "all pleadings shall be so construed as to do substantial justice", it seems that the lower court decision contradicts *Griffin*, as well as one of the basic philosophies of practice under the Federal Rules, i.e., of construction to reach substantial

justice. 5 Wright & Miller § 1286, *Federal Practice & Procedure*. Defendants here were given fair notice of what the claim is and the ground upon which it rests. *Conley v. Gibson*, 355 U.S. 41 (1957).

Petitioner contends that the lower court is in conflict with the Supreme Court test stated in *Conley*, supra, that the complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff due relief requested. Petitioner here has stated such a set of facts, as described herein above.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court held it was a violation of the teacher's right of free speech when the defendant School Board dismissed her for writing and publishing in a newspaper a letter critical of the Board of Education on certain issues.

Here, Petitioner, as faculty advisor to the College newspaper, allowed its student reporters and editors to report and express their views on matters having to do with the expense of the upcoming College graduation. The College administration shut down the newspaper as a result of the article and Petitioner, with various students and professors, protested. Petitioner was fired. The lower court decision denying him a remedy is in conflict with *Pickering*.

The lower court has also not given the freedoms protected under the First Amendment the preferred position required by *Saia v. New York*, 334 U.S. 558, 562 (1947).

B. **An Important Question of Federal Law Previously Undecided by This Court Should Be Settled by It.**

The opinion rendered in *Griffin v. Breckinridge*, 403 U.S. 88 (1971), did not have occasion to address itself to more than



one-half of the phrase ". . . any person or class of persons . . ." in 42 U.S.C. 1985(3), since its facts dealt with a class of persons.

It is the contention of Petitioner herein that he is a member of a class of persons discriminated against and that he also was discriminated against for speaking out for a group of persons suffering wrongful discrimination.

However, the Supreme Court has not spoken to whether the first part of the above quoted phrase, to-wit: "any person," has special meaning to the section apart from considerations of groups or classes of persons. For Rogers, the Petitioner herein, claims that even if he were not to be considered a member of a class as he has alleged, that he fits the "any person" language of the section, and has suffered from a conspiracy that had as its purpose to deprive his person of the equal protection of the laws, or of equal privileges and immunities under the laws.

C. **The Lower Court Has Rendered a Decision in Conflict With the Decision of Other Courts of Appeals on the Same Matter.**

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with decisions of the other Courts of Appeals, which decisions are substantially indistinguishable from the instant case.

Decisions of the Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits, and decisions of various District Courts within those Circuits, would extend a cause of action to a college professor for suffering a conspiracy by private individuals to violate certain federally protected civil rights including his rights to freedom of speech and assembly and thereby deny him the equal protection of the laws and of equal privileges and immunities under the laws.

The Court of Appeals for the Seventh Circuit affirmed the opinion of the District Court dismissing Petitioner Rogers' Amended Complaint against the Appellees for conspiring to deny Petitioner of the equal protection and equal privileges and immunities under the laws for his speech and for his conduct in support of a class of people who advocated a position unpopular with the Appellees.

42 U.S.C. § 1985(3) has been held to extend a cause of action to a privately employed person injured by a conspiracy among private persons to deprive the individual of freedom of speech and assembly. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975). (Because the matters in *Westberry* giving rise to the suit became moot, the court later withdrew its opinion and it has no precedential value. It is cited here only for its value in stating sound reasoning.) *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971); *Stern v. Massachusetts Indemnity and Life Insurance Co.*, 365 F.Supp. 433 (E.D. Pa. 1973); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Ames v. Vavreck*, 356 F.Supp. 931 (D. Minn. 1973).

A District Court in the 8th Circuit held alleged facts which indicated defendants discriminated against plaintiffs' right to freedom of speech and freedom of peaceable assembly and association, among other rights, constituted a denial of constitutional rights protected under § 1985(3). *Ames v. Vavreck*, supra. In the *Ames* case, no mention is made of the plaintiffs being of one sex, or faith, or race, but merely of there being "approximately twenty plaintiffs . . . [at] a gathering at the Lykken home in Minneapolis to protest the construction of the anti-ballistic missile system in North Dakota." At 935.

In *McCurdy v. Steele*, 353 F.Supp. 629 (D. Utah 1972), the plaintiff's allegations of an overt conspiracy among one faction of Indians to deprive another faction of certain civil rights, including freedom of speech, equal protection and free exercise



of religion, were cognizable under the statute granting jurisdiction for award of damages in conspiracy actions arising under the Civil Rights Act and specifically 42 U.S.C.A. § 1985(3).

The *McCurdy* Court refers to *Griffin v. Breckinridge* supra, as:

> . . . holding that it reaches conspiracies by private individuals. In so doing, the Court refused to limit the statutes' reach to conspiracies involving 'State action' . . . The Court suggested that Congress intended 'to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws', whatever their source.' *Griffin v. Breckinridge*, 403 U.S. at 97.
>
> . . . While declining to decide whether a conspiracy motivated by 'invidiously discriminatory intent other than racial bias would be actionable' under the statute . . . the Court's opinion generally emphasized the broad reach of the statute, stating, for example, that a conspiracy which aims 'at a deprivation of the equal enjoyment of rights secured by the law to all' may be reached by the statute. At 638-639.

Therefore, it can be seen that the *McCurdy* complaint was sufficient, as it is in Rogers, because the facts alleged, if true, would constitute a denial of the equal protection of the laws and the denial of free speech.

42 U.S.C. § 1985(3) has been held to extend a cause of action to an individual whose speech and conduct is in support of or directed to an identifiable group or class. *Richardson v. Miller*, supra; *Westberry v. Gilman Paper Co., Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Pendrell v. Chatham College*, 370 F.Supp. 494 (W.D. Pa. 1974); (2d case) 386 F.Supp. 341 (W.D. Pa. 1974).

42 U.S.C. § 1985(3) has been held to extend a cause of action to an individual whose speech is critical only of "internal"

matters not of general public interest or importance. *Brown v. Villanova University*, 378 F.Supp. 342 (E.D. Pa. 1974); *Pendrell v. Chatham College*, supra; *Stern v. Massachusetts Indemnity and Life Insurance Co.*, supra.

The Court of Appeals for the Third Circuit reversed and remanded the District Court's dismissal of an individual's § 1985(3) complaint against his private employer who conspired to discriminate against him for his speech critical of the employer's hiring position toward racial minorities. *Richardson v. Miller*, supra. The plaintiff's First Amendment rights enjoyed the protection of § 1985(3) because the underlying discriminatory bias of the private conspirators was aimed at an identifiable collection of people, i.e. racial minorities.

The Court of Appeals for the Eighth Circuit has held private conspiracies to deny individuals their First Amendment rights to assemble and worship freely are actionable under §1985(3). *Action v. Gannon*, supra. The plaintiffs and defendants were each found to have various First Amendment rights which were within the protective powers of Congress through the Fourteenth Amendment, Clause 5, violation of which rights were made actionable under 42 U.S.C. §1985(3).

A teacher under an employment contract to instruct military dependents has been found to have a cause of action for violation of First Amendment rights to free speech, notwithstanding the content of the speech was not of public interest or importance and was communicated only to those individuals concerned with internal educational policy matters. *Ring v. Schlesinger*, 502 F.2d 479 (D.C. Cir. 1974).

The Court of Appeals for the Sixth Circuit has found that an individual whose exercise of speech was infringed by individual policemen suffered a class-based discrimination where the conspirators were motivated to discriminate by the content of the speech. *Glasson v. City of Louisville*, supra.



The plaintiff was in no other way a member of a racial or other class.

The Court of Appeals for the Fifth Circuit has also spoken in an opinion eventually withdrawn *en banc* for mootness. An individual's cause of action against private employers who conspired against him in part to dismiss him from his employment was found within the scope of §1985(3) when the federal right involved was speech the employers found objectionable. *Westberry v. Gilman Paper Co.*, supra.

Students at a private university have been accorded preliminary relief in a U. S. District Court assuming jurisdiction due to the "substantial probability that plaintiffs will show at trial that there was a conspiracy among some of the defendants (school officials) to deny plaintiffs rights which are guaranteed them under the Constitution, and that such a conspiracy was based upon an invidiously discriminatory animus in that they were punished severely because they had exercised in the past and continued to exercise their First Amendment rights" through membership in a group critical of the role of students in internal college affairs, and thereby actionable under 42 U.S.C. §1985(3). *Brown v. Villanova University*, supra, at 344.

Another private school teacher has successfully proceeded against school officials under 42 U.S.C. §1985(3) when discriminated against in part for her speech and conduct in support of a group of which she was a member and in part for her speech in support of a group of which she was not a member. *Pendrell v. Chatham College*, supra.

Petitioner Rogers was conspiratorily discriminated against by Appellees because he was President of his local chapter of the American Association of University Professors at which meetings topics and positions believed critical of the Appellees were discussed.

Petitioner Rogers was conspiratorily discriminated against by Appellees because, as a faculty advisor of the student newspaper, he allowed and supported the right of student editors to express their views on certain matters believed by Appellees to be objectionable due to their content.

The Court of Appeals for the Seventh Circuit has denied Petitioner Rogers the protection of 42 U.S.C. §1985(3) designed to offer individuals protection against such private conspiracies which purposely deprive one of the equal protection of the laws or of the equal privileges and immunities under the laws, however indirectly the deprivation might be.

The protection of the statute should not fall on whether the content of speech is important to society as a whole or is of relative importance only to the institution in which the conspiracy to deprive an individual of certain civil rights takes place.

The protection of the statute should not fall on whether the individual injured by private conspiracy is a member of the class or group toward whom the discriminatry bias is cast as long as the bias is directed toward speech, sex, race, voting or some other identifiable civil right, even though here Petitioner Rogers is also alleged to be a member of a group discriminated against, and to have taken the defense of those who were discriminated against (those associated with the *McKendree Review*).

The Courts of at least six sister Circuits have acted consistent with protecting Petitioner Rogers' cause of action against Appellee McKendree College. The judgment and opinion of the Seventh Circuit appears to be in direct conflict with the decisions of the various other Circuits. This conflict justifies the grant of certiorari to review the judgment below.



D. **The Offensiveness of Appellees' Conduct Is Aggravated by Their Breach of His Contract and Damage to His Reputation.**

Not only was Petitioner deprived of his rights of freedom of speech, assembly and association, but he was terminated despite the fact that he had a written employment contract with the College. This dismissal so greatly damaged Petitioner in his efforts to gain another college teaching position that he went without employment for a period of five years following the firing.

The charges brought against Petitioner of alleged "unprofessional conduct" were so vague and indefinite as to present a bar to a meaningful defense by Petitioner and amount to a violation of his rights under the due process clause of the Fifth Amendment to the United States Constitution, as alleged in Petitioner Rogers' Amended Complaint.

E. **Previous Unreversed Decisions of the Seventh Circuit Itself and Districts Within That Circuit Conflict With Its Present Opinion.**

In *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958), the Court found that a person who alleged he was arrested as a suspect because he had a previous criminal record and was employed at two locations where suspicious burglaries and fires had taken place stated a cause of action under §1985(3). Indicating that the "classification: was created by the defendants themselves, the Court stated the classification was "as much within the condemnation of the Civil Rights Acts as discrimination based on a classification derived from color, race, or religion." Id. at 64.

The Court went further, holding §1985 only required plaintiff to show an inequality in the application and protection of

the laws between plaintiff and everyone else. "[E]ven if plaintiff were not a member of a class against which defendants discriminated in a deprivation of Federal civil rights, plaintiff *as a person*, still has an action under §1985." Id. at 65. (Emphasis added.)

In *Miles v. Armstrong*, 207 F.2d 284 (7th Cir. 1953), another post *Collins v. Hardyman*, 341 U.S. 651 (1951), and pre *Griffin v. Breckinridge*, supra, opinion, the Court has laid out the essential requirements for a cause of action under §1985 as a conspiracy to deprive a citizen of the equal protection and equal privileges and immunities under the laws of the United States Constitution provided the conspirators commit an act in furtherance of the conspiracy. Id. at 286.

Another Seventh Circuit case can also be distinguished. In *Davis v. Foreman*, 251 F.2d 421 (7th Cir. 1958), the Court dismissed plaintiff's complaint for failure to state a cause of action. However, the Court is not clear whether its dismissal was under §1983 or §1985. If the Court intended dismissal to be under §1985, it erroneously cited *Collins v. Hardyman*, supra, as requiring State action when clearly State action is not required under §1985. *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975). Finally, the plaintiff failed to allege conspiratorial acts by defendant or any violation of a civil right which would be necessary to state a cause of action and which is clearly distinguished from the present case.

In *Jewish War Veterans v. American Nazi Party*, 260 F. Supp. 452 (N.D. Ill. 1966), plaintiffs correctly stated a cause of action under §1985(3) when they alleged a conspiracy to deprive plaintiffs of equal privileges and immunities by clear and intentional discrimination by faith—a denial of the right to assembly for worship.

The standards for stating a cause of action under §1985(3) as set forth by this Court and courts within the various Circuits support a conclusion that Petitioner Rogers' Complaint alleged sufficient facts, which if proved at trial, state a cause of action under §1985(3) and support Rogers' Petition before this Court to reverse the Circuit Court and remand for trial.



**F. That Petitioner Has Stated a Cause of Action Under 42 U.S.C. §1986.**

Petitioner Rogers has brought this action against the various named Defendants individually and in their capacity as Trustees or employees of McKendree College.

The Trustees certainly have not denied their role on The Board of Trustees, and have acknowledged it in the termination of Petitioner's contract with them. Each of the named Defendants, having a particular role, either as a recommending administrator or a voting or participating Board member, in the conspiracy against Petitioner, was in a position of power to prevent or aid in the preventing of the denial of Petitioner's rights under §1985(3). Petitioner states that a cause of action under §1985 (3) has been set forth and because of the role of the Defendants as set forth in the Amended Complaint, they could have prevented or aided in preventing the commission of the wrongs against Petitioner and are, therefore, properly Defendants in the §1986 claim, and that a cause of action under §1986 has been stated.

## CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit in this cause.

Respectfully submitted

CHARLES J. KOLKER
Attorney at Law
Suite 316—Murphy Building
234 Collinsville Avenue
East St. Louis, Illinois 62201
Attorney for Petitioner

# APPENDIX

In the District Court of the United States
For the Eastern District of Illinois

No. 72-CIV-63

Howard L. Rogers,

Plaintiff,

vs.

The Board of Trustees of McKendree College, Lebanon, Illinois; Walter E. Ackerman, Roy C. Berry, Edward S. Bott, Dr. Ernest Britton, Mrs. B. R. Cummins, Charles L. Daily, Rayburn C. Fox, Dr. Max M. Goldenberg, Rev. Robert W. Gordon, Rev. Billy Hahs, Harold Hanswer, David M. Hardy, Frank E. Harris, Mrs. Ralph M. Hill, Mrs. Darrell James, Ernest A. Karandjeff, Rev. Robert Krause, Arthur E. Knapp, Eugene M. Leckrone, Rev. Donald E. Lowe, Joseph R. Lowery, R. Mason Holmes, Consuello Luttrell, W. P. Mautz, Rev. James W. Owens, Paul Simon, Rev. R. Paul Sims, Charles T. Richards, Avery Schermer, Rev. Ira Thatford, Everett Thompson, Rev. Jack Travelstead, Bishop Lance Webb, Robert F. White, Dr. Donald E. Wilson, Robert E. Woodward, Howard L. Young, and Adolph Unruh, individually, and in their capacity as members of the Board of Trustees of McKendree College, Eric Rackham, individually, and in his capacity as President of McKendree College, Emerial Owen, individually, and in his capacity as Dean of McKendree College, George Hand, individually, and in his capacity as Chairman of the Academic Affairs Committee of the Board of Trustees of McKendree College,

Defendants.

**AMENDED COMPLAINT**

Comes now Howard L. Rogers, Plaintiff herein, by his Attorney, Charles J. Kolker, and for his Amended Complaint herein, states as follows:

**Count I**

1. That the Plaintiff, Howard L. Rogers, is a citizen of the United States and the State of Illinois, within the Eastern District of Illinois.

2. That this is a civil action arising under the Constitution and the Laws of the United States, more particularly the First, Fifth, and Fourteenth Amendments and 42 United States Code Sections 1983, 1985(3) and 1986. Jurisdiction over this cause is conferred on this Court by the provisions of 28 United States Code Sections 1343(3) and 1331. The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

3. That the Defendants Walter E. Ackerman, Roy C. Berry, Edward S. Bott, Dr. Ernest Britton, Mrs. B. R. Cummins, Charles L. Daily, Rayburn C. Fox, Dr. Max M. Goldenberg, Rev. Robert W. Gordon, Rev. Billy Hahs, Harold Hanswer, David M. Hardy, Frank E. Harris, Mrs. Ralph M. Hill, Mrs. Darrell James, Ernest A. Karandjeff, Rev. Robert Krause, Arthur E. Knapp, Eugene M. Leckrone, Rev. Donald E. Lowe, Joseph R. Lowery, R. Mason Holmes, Consuello Luttrell, W. P. Mautz, Rev. James W. Owens, Paul Simon, Rev. R. Paul Sims, Charles T. Richards, Avery Schermer, Rev. Ira Thatford, Everett Thompson, Rev. Jack Travelstead, Bishop Lance Webb, Robert F. White, Dr. Donald E. Wilson, Robert E. Woodward, Howard L. Young, and Adolph Unruh are, and/or were at times mentioned in this controversy, members of the Board of Trustees of McKendree College and are, and/or were, responsible for the operation, management and control of McKendree College.

4. That the Defendant, Eric Rackham, is the President of McKendree College and thereby the chief administrative officer of McKendree College, and responsible, among other things, for reviewing, approving and recommending to the Board of Trustees the recruitment, selection, disciplining and dismissal of instructors and other staff members of McKendree College.



5. That the Defendant, Emerial Owen, is the Dean of McKendree College and thereby performs duties in connection with the organization and administration of the curriculum, faculty personnel, academic standards, admissions, evaluative services, academic record, and other such functions as will serve to insure the quality of the academic program at McKendree College.

6. That the Defendant, George Hand, was, at all times complained of in the above-styled Complaint, the Chairman of the Academic Affairs Committee of the Board of Trustees and thereby responsible for review of all academic affairs, appointment, promotion, disciplining and dismissal of academic personnel and policies relating thereto, of McKendree College.

7. That McKendree College is a corporation not for pecuniary profit, subject to the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act to Incorporate the McKendree College," approved January 26, 1839.

8. That Section 2.01 of the By-Laws of McKendree College provides that the regulation of McKendree College by the By-laws shall not be inconsistent with the Constitution and the Laws of the United States, or of the State of Illinois.

9. That Section 5.06 of the By-laws of McKendree College provides that the Board of Trustees may cancel any contract if it shall find that any member of the faculty is incompetent, immoral or dishonest, or for any other cause which, in the opinion of the Board, is detrimental to McKendree College.

10. That on or about March 14, 1970, the Plaintiff signed and returned to the Defendant, Eric Rackham, President of McKendree College, a written contract whereby Plaintiff would continue as a full time faculty member of McKendree College and would be paid $9,000.00 for said services. (A copy of said contract is attached hereto as Appendix A to this Complaint.)

11. That on May 23, 1970, the Defendant Board of Trustees voted unanimously against the continued service of Plaintiff herein and requested that because of alleged unprofessional conduct he be dismissed as soon as possible. (A copy of the minutes of said meeting is attached hereto as Appendix B to this Complaint.)

12. That on July 13, 1970, the Defendant, Eric Rackham, wrote the Plaintiff of the decision of the Defendant Board of Trustees of McKendree College to dismiss him and for the first time listed eight (8) reasons for the dismissal. This letter further stated that one meeting had been held to implement the Board of Trustees' decision and invited Plaintiff, and the counsel of his choice, to be present at another meeting on July 25, 1970. (A copy of said letter is attached hereto as Appendix C of this Complaint.)

13. That on July 25, 1970, the Academic Affairs Committee of the Defendant Board of Trustees of McKendree College met to discuss the charges against Plaintiff herein and the means of implementing the decision of the Defendant Board of Trustees of McKendree College, made at said Board's meeting of May 23, 1970, with respect to the Plaintiff herein.

14. That on August 15, 1970, the Academic Affairs Committee of the Defendant Board of Trustees of McKendree College continued its meeting of July 25, 1970, and Plaintiff, through his counsel, moved to expunge any and all proceedings had with reference to the charges presented in the letter from Defendant, Eric Rackham, described in paragraph 12, Count I, of this Complaint, as violative of Plaintiff's First, Fifth and Fourteenth Amendment rights as guaranteed by the U.S. Constitution and violative of the provisions of 42 United States Code Sections 1983, 1985(3) and 1986.

15. That on August 29, 1970, the Defendant Board of Trustees of McKendree College again voted to discharge Plaintiff



herein and terminated Plaintiff's contract for breach of same. (A copy of the Letter of Notice to Discharge from the Corporation's Counsel to the Plaintiff is attached hereto a. Appendix D of this Complaint.)

16. That Plaintiff is informed and believes that the real reasons for his dismissal was his vocal protest, on the grounds of free speech, against the suspension of the *McKendree Review*, the student publication at McKendree College, on March 25, 1970, and his alleged contact with the local press concerning the said incident.

17. That the Plaintiff herein was dismissed for making statements "to someone other than" the President of McKendree College, being allegedly critical of the administration of the College (see letter of July 13, 1970 attached hereto as Appendix C), said statements being protected by the First Amendment to the U. S. Constitution, and that Defendants, acting in concert at meetings on May 23, July 25, August 15 and August 29, 1970, *inter alia*, wrongfully discharged Plaintiff for his exercise of the freedom of speech and conspired and undertook to willfully deprive Plaintiff of his employment and right to obtain further employment, and to freely speak in the course of his employment, in violation of the provisions of the First Amendment to the Constitution of the United States and the equal protection of the laws or of equal privileges and immunities under the laws, as incorporated under the provisions of the Fourteenth Amendment and in violation of the Laws of the United States.

18. That Defendants held and conducted meetings on May 23, July 25, August 15 and August 29, 1973, *inter alia*, with the purpose to wrongfully and purposely deprive Plaintiff of his right to peaceably assemble with his fellow professors and with the students of the College at which he taught, and to deprive him of his right to freely speak to same, and did wrong-

fully and purposely conspire to deprive and/or deprive him of exercising his rights as a professor and President of his local chapter of the American Association of University Professors in making comments, debating issues and presiding over discussions of issues concerning the College (See Charge No. 3, letter of July 13, 1970, attached hereto as Appendix C), all in violation of his rights to peaceably assemble, associate and to freely speak, as guaranteed by the provisions of the First Amendment to the Constitution of the United States and of equal protection of the laws or of equal privileges and immunities under the laws, as incorporated under the provisions of the Fourteenth Amendment and in violation of the Laws of the United States.

19. That Defendants wrongfully and purposely conspired to deprive, and/or did deprive, Plaintiff of a significant property interest, to-wit: His rights to an offered and accepted employment contract and the benefits therefrom, as well as to continued employment either with Defendant College or elsewhere, in violation of the guarantees of the Fifth Amendment to the U.S. Constitution and the Fourteenth Amendment to the U.S. Constitution and of the Laws of the United States.

20. That Plaintiff's aforementioned conduct, which Plaintiff is informed and believes was relied upon by Defendants, is protected by the First and Fourteenth Amendments and by further reason of Sections 2.01 and 5.06 of the By-laws of McKendree College does not constitute sufficient grounds for dismissal.

21. That as a direct result of the Defendants' conduct, the Plaintiff has suffered serious damages resulting from inconvenience, damage to reputation, inability to find other employment, breach of contract, loss of income, future loss of wages, loss of tenure consideration, and extreme physical, mental and emotional suffering.



Wherefore, Plaintiff prays this Honorable Court for judgment in the amount of Three Hundred Thousand and No/Hundredths Dollars ($300,000.00) together with his costs herein and such other further relief as the Court may deem proper.

Charles J. Kolker
Attorney for Plaintiff

**Count II**

1. That Plaintiff herein realleges and restates with full force and effect the allegations contained in Count I, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

21. That Plaintiff herein claims that the decision to dismiss him was made by the Defendant Board of Trustees of McKendree College on May 23, 1970, without prior notice to Plaintiff and without opportunity to defend himself, and violated Plaintiff's right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Section 2.01 of the By-laws of McKendree College.

22. That as a direct result of the Defendants' conduct, the Plaintiff has suffered serious damages resulting from inconvenience, damage to reputation, inability to find other employment, breach of contract, loss of income, future loss of wages, loss of tenure consideration, and extreme physical, mental and emotional suffering.

Wherefore, Plaintiff prays this Honorable Court for judgment in the amount of Three Hundred Thousand and No/Hundredths Dollars ($300,000.00) together with his costs herein and such other further relief as the Court may deem proper.

Charles J. Kolker
Attorney for Plaintiff

**Count III**

1. That Plaintiff herein realleges and restates with full force and effect the allegations contained in Count I, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

21. That Plaintiff herein claims that the charges contained in the letter from Defendant, Eric Rackham, cited in Count I, paragraph 12, are so vague and indefinite that they present a bar to the presentation of a meaningful defense and violate Plaintiff's right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Section 2.01 of the By-laws of McKendree College.

22. That as a direct result of the Defendants' conduct, the Plaintiff has suffered serious damages resulting from inconvenience, damage to reputation, inability find other employment, breach of contract, loss of income, future loss of wages, loss of tenure consideration, and extreme physical, mental and emotional suffering.

Wherefore, Plaintiff prays this Honorable Court for judgment in the amount of Three Hundred Thousand and No/Hundredths Dollars ($300,000.00) together with his costs herein and such other further relief as the Court may deem proper.

Charles J. Kolker
Attorney for Plaintiff

**Count IV**

1. That Plaintiff herein realleges and restates with full force and effect the allegations contained in Count I, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

21. That Plaintiff has performed all the conditions on his part that could have been performed in that he was ready, willing and able to teach as a full time faculty member of McKendree College at the commencement of the 1970-71 Academic Year.



22. That Plaintiff is informed and believes that he has committed no act that would constitute a breach of any provision of his contract with McKendree College and that, instead, his dismissal was a result of Constitutionally protected activities described in Counts I, II, and III of this Complaint.

23. That Plaintiff has been damaged by the Defendants' breach in the sum of Eleven Thousand and No/Hundredths Dollars ($11,000.00), being the amount that Plaintiff would have received for teaching as a full time faculty member of McKendree College during the 1970-71 Academic Year, and that amount expended by Plaintiff in efforts to gain employment.

Wherefore, Plaintiff prays this Honorable Court for judgment in the amount of Eleven Thousand and No/Hundredths Dollars ($11,000.00) together with the costs of this action and such other and further relief as the Court may deem proper.

Charles J. Kolker
Attorney for Plaintiff

**Count V**

1. That Plaintiff herein realleges and restates with full force and effect the allegations contained in Count I, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

21. That Plaintiff herein claims that the decision to dismiss him was made by the Defendant Board of Trustees of McKendree College on May 23, 1970, without prior notice to Plaintiff and without opportunity to defend himself, and violated Plaintiff's right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Section 2.01 of the By-laws of McKendree College.

22. That Plaintiff herein claims that the charges contained in the letter from Defendant, Eric Rackham, cited in Count I, paragraph 12, are so vague and indefinite that they present a bar to the presentation of a meaningful defense and violate Plaintiff's right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Section 2.01 of the By-laws of McKendree College.

23. That Defendants, having knowledge of any or all of the wrongs hereinabove conspired to be done, and/or actually done, and having power to prevent or aid in preventing the commission of the same, neglected or refused so to do, and could have by reasonable diligence, prevented aforesaid wrongs.

24. That as a direct result of the Defendants' conduct, the Plaintiff has suffered serious damages resulting from inconvenience, damage to reputation, inability to find other employment, breach of contract, loss of income, future loss of wages, loss of tenure consideration, and extreme physical, mental and emotional suffering.

Wherefore, Plaintiff prays this Honorable Court for judgment in the amount of Three Hundred Thousand and No/Hundredths Dollars ($300,000.00) together with the costs of this action and such other and further relief as the Court may deem proper.

Charles J. Kolker
Attorney for Plaintiff

Charles J. Kolker
Suite 316—Murphy Building
234 Collinsville Avenue
East St. Louis, Illinois 62201
274-3636; 398-3111

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In the District Court of the United States
For the Eastern District of Illinois

Howard L. Rogers,
Plaintiff,
vs.
The Board of Trustees of McKendree College, et al.,
Defendants.
} Civil No. 72-63

**ORDER**

Foreman, Judge:

Plaintiff brings this cause of action pursuant to 42 U.S.C. § 1983, 1985(3), and 1986 with jurisdiction predicated upon 28 U.S.C. § 1331, 1343(3). Defendants have moved to dismiss this action for lack of jurisdiction of the subject matter, contending that the defendants were not acting under color of state law.

The essential elements of a cause of action under 42 U.S.C. § 1983 are that the conduct complained of (1) must have been done under color of state law and, (2) must deprive another of rights, privileges or immunities secured by the Constitution of the United States. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *U. S. v. Price*, 383 U.S. 787 (1966); *Monroe v. Pape*, 365 U.S. 167 (1961). Thus, before this Court has subject matter jurisdiction over this case, it must be shown that defendants acted under color of state law. The Civil Rights Act proscribes only state action, and private action, however wrongful, can not form the basis for relief under § 1983. *U. S. v. Guest*, 383 U.S. 745 (1966); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

To determine the presence of state action in a particular case, the Court must look to the individual facts of each case to determine of the conduct complained of is private or is "so impregnated with a governmental character as to become subject to the Constitutional limitations placed upon state actions." *Evans v. Newton*, 382 U.S. 296 (1966). In determining to what extent a proscription of the Fourteenth Amendment should be applied to the private university, the most relevant factors are (a) the extent of state action over the college financially or by regulation; and, (b) the extent to which the college exercises governmental or public powers. *Blackburn v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968). There are only two acts alleged in the amended complaint which would constitute the acts of the defendants as acts done under color of state law. First it is alleged that McKendree College is a corporation, not for pecuniary profit, subject to the provisions of an Act of the General Assembly of the State of Illinois entitled "An Act to Incorporate McKendree College," approved January 26, 1839. Second is the allegation that §2.01 of the By-Laws of McKendree College provide that the regulations of McKendree College by the By-Laws shall not be inconsistent with the Constitution and Laws of the United States or the State of Illinois. Without more, these acts are clearly insufficient to warrant the conclusion that the actions of these defendants were performed under color of state law.

State involvement sufficient to transform a "private university" into a "state university" requires more than merely chartering the university, providing financial aid in the form of public funds, *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S. D. N. Y. 1968), or granting tax exemptions. *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969). See also, *Blackburn, supra*, at 123.



For the foregoing reasons, the Court concludes that the actions of the defendants in this cause were not performed under color of state law. See generally *Brownley v. Gettysburg College*, 338 F.Supp. 725 (N.D. Pa. 1972). Thus, this Court lacks subject matter jurisdiction of this cause of action.

Plaintiff also bases this cause of action upon 42 U.S.C. §1985(3). Section 1985, however, requires in all cases an allegation that the conspiracy had "as its purpose a class-based invidiously discriminatory deprivation of equal protection of the laws or of equal privileges and immunities under the laws." *Lesser v. Braniff Airways, Inc.*, — F.2d — (7th Cir. No. 75-1043, slip op. p. 10, June 18, 1975). The allegations in this complaint clearly do not allege conspiracy which has as its purpose such a class-based invidiously discriminatory deprivation. Therefore, this allegation does not state a claim upon which relief can be granted.

Plaintiff also seeks to base this cause of action upon 42 U.S.C. §1986. No claim for relief under that section relating to an action for neglect to prevent a conspiracy and interfere with civil rights will lie unless a valid claim has first been established under §1985 relating to conspiracy to interfere with Civil Rights. *Johnston v. National Broadcasting Co., Inc.*, 356 F.Supp. 904 (E. D. N. Y. 1971). See also, *Huey v. Barloga*, 277 F.Supp. 864 (N. D. Ill. 1967).

For the reasons set forth above, defendant's Motion to Dismiss should be and is hereby Granted.

Dated: July 9, 1975.

James L. Foreman
United States District Judge

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Argued February 26, 1976

April 1, 1976

Before

Hon. Thomas E. Fairchild

Hon. Luther M. Swygert

Hon. William E. Steckler*

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|---|---|
| Howard L. Rogers, Plaintiff-Appellant, | Eastern District of Illinois, East St. Louis Division |
| No. 75-1862 vs. | |
| The Board of Trustees of McKendree College, Lebanon, Illinois, et al., Defendants-Appellees. | 72-C-63 James L. Foreman, Judge |

**ORDER**

This is a Civil Rights action brought under 42 U.S.C. §§ 1983, 1985(3), and 1986. The appellant, Howard L. Rogers, is a former professor of the appellee McKendree College and this action was precipitated by the College's termination of Rogers' employment.

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* Honorable William E. Steckler, Chief Judge for the Southern District of Indiana, is sitting by designation.



On March 10, 1970, Rogers, as faculty advisor to *The McKendree Review*, the college newspaper, allowed its student reporters and editors to report and express their views on matters having to do with the expense of the upcoming college graduation. The college administration shut down *The McKendree Review* on March 25, 1970.

On May 23, 1970, the Board of Trustees of McKendree College voted against the continued service of Rogers and requested that he be dismissed as soon as possible. Thereafter hearings were held before the Academic Affairs Committee of the Board of Trustees and the Committee recommended that Rogers be discharged immediately and his contract of employment terminated. On August 29, 1970, the Board of Trustees adopted this recommendation.

In his amended complaint Rogers alleges that he was discharged for making critical statements about the college administration, for his vocal protest against the suspension of *The McKendree Review*, and for his alleged contact with the local press concerning the suspension of publication of the newspaper.

Subsequent to his discharge Rogers filed this action against the Board of Trustees of McKendree College, individually and in their capacity as board members, and also the President, Dean, and Chairman of the Academic Affairs Committee of the Board. The defendants filed a Motion to Dismiss Plaintiff's Amended Complaint which was granted by an Order of the District Court dated July 9, 1975. Rogers has hereby appealed from that order.

The three issues presented by this appeal are whether the district court erred in dismissing appellant's claims based upon 42 U.S.C. § 1983,[1] whether it erred in dismissing appellant's

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[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person

claims based upon 42 U.S.C. § 1985(3)[2] and whether it erred in dismissing appellant's claims based upon 42 U.S.C. § 1986.[3]

The district court dismissed appellant Rogers' § 1983 claim because it concluded that the actions of the defendants in this cause were not performed under color of state law. On appeal Rogers contends that his amended complaint provided the court with sufficient facts from which to make a legal finding that the defendants did act under color of the laws and customs of the State of Illinois. For the purpose of this appeal we assume that the facts alleged in the amended complaint are true.

In order to state a claim actionable under § 1983 it is necessary to allege state involvement in the discriminatory actions complained of. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Private action, however wrongful, cannot form

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within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,,suit in equity, or other proper proceeding for redress."

[2] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

[3] "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; . . ."



the basis for relief under § 1983. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

As noted by the district court, there are only two allegations in Rogers' amended complaint which could be construed as allegations attempting to demonstrate that the defendants acted under color of state law. First is the allegation that McKendree College is a corporation, not for pecuniary profit, subject to the provisions of an Act of the General Assembly of the State of Illinois entitled "An Act to Incorporate McKendree College," approved January 26, 1839. Second it is alleged that § 2.01 of the Bylaws of McKendree College provides that the regulation of McKendree College by the Bylaws shall not be inconsistent with the Constitution and laws of the United States or the State of Illinois. We agree with the district court that these allegations are clearly insufficient to show that the defendants in the instant case acted under color of state law.[4]

The mere fact that McKendree College was incorporated by the state does not lend any support to the claim that the defendants acted under color of state law. In our recent opinion of *Cohen v. Illinois Institute of Technology*, 524 F. 2d 818 (7th Cir. 1975), this court stated, "Every private corporation, whether profitable or charitable, is chartered by the States; unless the charter contains a special authorization or directive to engage in the challenged conduct, the fact that it is granted by

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[4] On appeal appellant Rogers has presented several examples of alleged state involvement with McKendree College which were not included in his amended complaint and which were never presented to the district court. Aside from the question of whether these additional examples of alleged state involvement could properly be considered for the first time by this court, it would appear that they are also insufficient to establish that the defendants acted under color of state law. None of these additional allegations show that any state instrumentality has affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination. *See, Cohen v. Illinois Institute of Technology*, 524 F. 2d 818 (7th Cir. 1975).

the State is of no significance." *Id* at 824. Rogers has not alleged that any such "special authorization or directive" is contained in the McKendree charter and therefore the college's incorporation by the state is of no import. *See, Powe v. Miles*, 407 F. 2d 73, 80 (2d Cir. 1968).

Nor has Rogers shown the requisite state involvement under § 1983 by alleging that § 2.01 of McKendree's Bylaws provides that the regulation of the college by its Bylaws shall not be inconsistent with the Constitution and laws of the United States or of the State of Illinois. This bylaw merely reflects a legal truism and in no way demonstrates that the State of Illinois was involved in the conduct complained of in this action.

The district court also dismissed Rogers' claim based upon 42 U.S.C. § 1985(3). The court, citing *Lesser v. Braniff Airways, Inc.*, 518 F. 2d 538 (7th Cir. 1975), ruled that actions based on § 1985(3) must contain an allegation that a conspiracy existed which had as its purpose a class-based invidiously discriminatory deprivation of equal protection of the laws or of equal privileges and immunities under the laws.

Appellant Rogers contends that § 1985(3) only requires that a complaint based thereon allege "a motivation, animus, to deprive plaintiff of the equal protections or equal privileges and immunities of the laws." In support of this contention appellant relies upon *Griffin v. Breckenridge*, 403 U.S. 88 (1971). However, appellant misinterprets the language of *Griffith*. In that opinion the Supreme Court made the following statement concerning the meaning of § 1985(3):

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Id*. at 102.



This language has been interpreted as requiring a claim based on § 1985(3) to include an allegation of racial or otherwise class-based invidious discriminatory animus. *Lesser v. Braniff Airways, Inc.*, 518 F. 2d 538 (7th Cir. 1975); *Arnold v. Tiffany*, 359 F. Supp. 1034 (C.D. Cal. 1973), *aff'd*, 487 F. 2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *Denman v. Leedy*, 479 F. 2d 1097 (6th Cir. 1973); *Waits v. McGowan*, 516 F. 2d 203 (3d Cir. 1975). As the appellant has failed to include any such allegation in his amended complaint the district court acted properly in dismissing his claim based on § 1985(3).

The appellant has also alleged a claim based on 42 U.S.C. § 1986 in his amended complaint. However, in order to allege a claim based on § 1986 it is necessary to first establish that a valid claim under 42 U.S.C. § 1985 exists. *Hahn v. Sargent*, 388 F. Supp. 445 (D. Mass. 1975), *aff'd*, 523 F. 2d 461 (1st Cir. 1975); *Hamilton v. Chaffin*, 506 F. 2d 904 (5th Cir. 1975). As this court has determined that appellant failed to allege a valid § 1985 claim in his amended complaint, it is apparent that his claim based on § 1986 must also be deemed invalid.

The order of the district court dismissing appellant's claims based on §§ 1983, 1985(3) and 1986 is Affirmed.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1897

HOWARD L. ROGERS,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF McKENDREE COLLEGE,
Lebanon, Illinois, et al.,
Appellees.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD BOMAN
520 First National Bank Building
East St. Louis, Illinois 62201

WILLIAM GAGEN
109 West St. Louis Street
Lebanon, Illinois 62254

Attorneys for Appellees

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

## INDEX



## CITATIONS

### Cases Cited

**Statutes Cited**



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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

HOWARD L. ROGERS,
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vs.

THE BOARD OF TRUSTEES OF McKENDREE COLLEGE,
Lebanon, Illinois, et al.,
Appellees.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, the Board of Trustees of McKendree College and numerous individuals as trustees or officials of McKendree College, oppose the allowance of petitioner, Howard L. Rogers' Petition for a Writ of Certiorari.

### OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to the Petition for Writ of Certiorari.

## QUESTIONS PRESENTED

1. Whether petitioner stated a cause of action under U.S.C. Section 1985(3) in Counts I, II, III, IV and V of his Amended Complaint?

2. Whether petitioner stated a cause of action under 42 U.S.C. Section 1986 in Counts I, II, III, IV and V of his Amended Complaint?

## STATUTORY PROVISIONS

United States Code, Title 42 § 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or



> privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code, Title 42 § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in any action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

## STATEMENT OF THE CASE

Petitioner filed an Amended Complaint in the District Court of the United States for the Eastern District of Illinois, attempting to allege causes of action under 42 U.S.C. § 1983, 1985(3), and 1986. Specific allegations are stated in each of the five Counts of the Amended Complaint.

In Counts I through V petitioner alleges violations of the First and Fourteenth Amendments.

Besides the allegations of violations of the First and Fourteenth Amendments, petitioner also alleges violations of his rights under the Fifth Amendment in the Counts II through V.

This case was before the District Court and the Court of Appeals on the Amended Complaint and Respondent's motion to dismiss.

The Court of Appeals for the Seventh Circuit affirmed the order of the District Court which dismissed the Amended Complaint for failure to state a cause of action.

The Ruling as to § 1983 is not challenged by petitioner.

The Rulings on § 1985(3) and 1986, which may be considered together, are what petitioner desires to have this Court review.



## ARGUMENT

In his Petition, petitioner contends that the decision of the Court of Appeals for the Seventh Circuit is contrary to prior decisions of the Supreme Court, that an important question of federal law left undecided in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), should now be decided, and that the decision conflicts with decisions of other Courts of Appeals as well as decisions of the Court of Appeals for the Seventh Circuit.

Essentially, petitioner continues to claim that the Second Amended Complaint states a cause of action under Sections 1985(3) and 1986.

The petitioner is correct in his contention that his pleading is, by Rule 8(f), required to be construed so as to substantial justice. This suggests liberality in construction to favor the pleader, but it cannot be read so as to disregard concern for substantial justice to the persons against whom the pleading is directed.

The Court of Appeals, as to 1985(3), affirmed the District Court for the simple reason that the Amended Complaint failed to include an allegation that the respondents acted, in conspiracy, because of a class-based discriminatory animus, there being no racial aspect to the case.

Such an allegation is an essential element in the statement of a cause of action under 1985(3). *Griffin v. Breckenridge*, 402 U.S. at 102, states the requirement as follows:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

*Griffin v. Breckenridge* swept away much of the previous law which had been handed down by the Federal Courts regarding § 1985(3). In reversing its decision in *Collins v. Hardyman*, 342 U.S. 651 (1951), this Court breathed new life into § 1985(3) as a remedy. To a large extent, the Court, in *Griffin*, rewrote the archaic language of 1985(3) by extending it to private conspiracies which would deny persons equal protection and equal rights under the law.

In deciding *Griffin*, however, the Court was conscious of the problem of opening up Federal Courts to volumes of litigation for wrongs committed by private groups or persons acting in concert which were not contemplated by the drafters of the original Statute. After reviewing the legislative history of § 1985(3), the Court noted the essential requirement that the motivational intent behind the conspiracy must be "racial or otherwise class-based invidiously discriminatory." 403 U.S. at 102.

In *Griffin*, the Court considered a private conspiracy to deny persons their constitutional protected rights because of their racial origin. However, Justice Stewart in his opinion opened the way for the inclusion of private conspiracies under § 1985 (3), where a clearly defined class, based upon race, creed, religion or national origin has been the subject of conspiracy.

In *Stern v. Massachusetts Indemnity Life Insurance Company*, 356 F.Supp. 433 (E.D. Pa. 1973), a district court held that the plaintiff's allegations of job discrimination because of her sex stated a cause of action. Similarly the allegations of discrimination because of one membership in an Indian tribe was held sufficient in *McCurdy v. Steele*, 353 F.Supp. 629 (C.D. Ut. 1973). The Third Circuit extended the remedy provided by § 1985(3) to an individual subjected to conspirational discrimination because of his criticism of racial hiring policies. *Richardson v. Miller*, 446 F.2d 1247 (3rd Cir. 1971). Petitioner cites *Action v. Gannon*, 450 F.2d 1227 (8th Cir.



1971), in which the Court of Appeals ruled that a cause of action was stated under 1985(3) by a religious denomination of worship seeking a remedy from conspiratorial denial of their freedom.

Common in each of these decisions is the holding that the discriminatory intent was toward membership in an identifiable class. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975). In other words, it must be the intent of the conspirators to deny a person his constitutionally guaranteed rights because of his membership in a race, creed, religion or another identifiable group.

It was not the intent of this Court in *Griffin v. Breckenridge* that the class, which is the subject of the discrimination, consist of all persons in the United States. Petitioner's Amended Complaint makes no attempt to limit the class as required by *Griffin*. As a result of this deficiency the Court of Appeals had no choice but to affirm the District Court's dismissal of the Amended Complaint. This decision was consistent with the Court of Appeals previous decisions in *Lesser v. Braniff Airways, Inc.*, 518 F.2d 538 (1975), and *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975).

Thus, the case which petitioner would have this Court review does not present a novel question to be decided. Simply stated, it is an instance of the failure of the pleading to state a cause of action because of the absence of an essential element, namely, the pleading of facts which show that the alleged conspiracy was based upon a racial or other class-based discriminatory intent. Absent that necessary element there is no cause of action stated under § 1985(3).

Since there was no violation of § 1985(3) allegation petitioner in his Amended Complaint, there was no cause of action permitted under § 1986.

The District Court and Court of Appeals so held.

## CONCLUSION

Respondents respectfully contend that the Petition should be denied.

HOWARD BOMAN
520 First National Bank Building
East St. Louis, Illinois 62201

WILLIAM GAGEN
109 West St. Louis Street
Lebanon, Illinois 62254

Attorneys for Appellees